ferent result. Here, the Board, before that filing, had proposed a refund in the same amount as that later set forth in the order (R. 399, 415). Moreover, statutory renegotiation proceedings had already been begun at that time. In these circumstances, issuance of the formal order before, rather than after the filing date, is of no consequence. Cf. *Riehle* v. *Margolies*, 279 U. S. 218. In both instances, the language of the Renegotiation Act requires that the Board, the agency especially competent and specifically created by Congress to make excessive profit determinations, be permitted to make that determination.[18]

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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JUNE 1950.

[18] Even where the administrative proceedings were first instituted *after* the filing of the bankruptcy action, this Court, recognizing the agency's specialized knowledge, has refused to allow the bankruptcy court to redetermine the matter adjudicated by the agency. *Arkansas Comm'n* v. *Thompson*, 313 U. S. 132.

APPENDIX

1. Sections 57 and 63 of the Bankruptcy Act (11 U. S. C. 93, 103) provide in pertinent part:

> Sec. 57. Proof and Allowance of Claims
>
> a. A proof of claim shall consist of a statement under oath, in writing and signed by a creditor, setting forth the claim; the consideration therefor; whether any and, if so, what securities are held therefor; and whether any and, if so, what payments have been made thereon; and that the claim is justly owing from the bankrupt to the creditor.
>
> * * * * *
>
> c. Proofs of claim may, for the purpose of allowance, be filed by the claimants in the court of bankruptcy where the proceedings are pending or before the referee if the case has been referred.
>
> * * * * *
>
> Sec. 63. Debts Which May Be Proved
>
> a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) costs taxable against a bankrupt who was at the time of the filing of the petition by or against him plaintiff in a cause of

action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a probable debt; (4) an open account, or a contract express or implied; (5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments; * * *.

* * * * *

2. The Second Renegotiation Act (Act of February 25, 1944, Title VII, 58 Stat. 21, 78–92, 50 U. S. C. App. 1191) provides in pertinent part:

SEC. 701. RENEGOTIATION OF WAR CONTRACTS.

* * * * *

(b) RENEGOTIATION OF WAR CONTRACTS.—Section 403, as amended, of the Sixth Supplemental National Defense Appropriation Act, 1942, is amended to read as follows:

"SEC. 403. * * *

* * * * *

"(c) (1) Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the

renegotiation proceeding. At the conference, which may be adjourned from time to time, the Board shall endeavor to make a final or other agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other matters relating thereto as the Board deems advisable. Any such agreement, if made, may, with the consent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. The Board shall exercise its powers with respect to the aggregate of the amounts received or accrued during the fiscal year (or such other period as may be fixed by mutual agreement) by a contractor or subcontractor under contracts with the Departments and subcontracts, and not separately with respect to amounts received or accrued under separate contracts with the Departments or subcontracts, except that the Board may exercise such powers separately with respect to amounts received or accrued by the contractor or subcontractor under any one or more separate contracts with

the Departments or subcontracts at the request of the contractor or subcontractor. Whenever the Board makes a determination with respect to the amount of excessive profits, whether such determination is made by order or is embodied in an agreement with the contractor or subcontractor, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination. Such statement shall not be used in The Tax Court of the United States as proof of the facts or conclusions stated therein.

* * * * *

"(d) (1) There is hereby created a War Contracts Price Adjustment Board (in this section called the 'Board'), which shall consist of six members * * *

* * * * *

"(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any

court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo * * *

* * * * * *

"(e) This section may be cited as the 'Renegotiation Act'."

* * * * *

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CHARLES ELMORE CROPLEY

No. 79

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1949

BURTON B. PADDOCK, Trustee in Bankruptcy of the Estate of GLOBE AIRCRAFT CORPORATION, Bankrupt,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONER

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COMMERCIAL RECORDER, FORT WORTH, TEXAS—9-20-50—70

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REPLY BRIEF OF PETITIONER

Opposition brief contains irrelevant and in some respects inaccurate recitals of fact, which are so woven into the argument as to present the case in a distorted perspective. Counsel for Petitioner find it necessary to point out these irrelevant and inaccurate statements and in so doing to further indicate the need for a decision by this court because of the pervasive importance of the questions presented.

I.

Irrelevant and Inaccurate Statements

The fact statement that Globe's airplane sales prior to World War II were made through 45 regular distributors and 350 authorized dealers (Resp. Brief 3), is misleading and irrelevant. It is derived from a Prospectus issued by Globe on March 18, 1946 (R. 388-392) in connection with its future commercial operations.

The fact statement that Production was hired "for the purpose of assisting it (Globe) in making approaches 'to the representatives of the Government in order to get contracts' " (Resp. Brief 3, 14), is not only inaccurate but suggests improper conduct, an unwarranted implication, as will be clearly disclosed by reference to the employment contracts (R. 88-95) and (R. 192-213, testimony of Kennedy under cross-examination).

The fact statement that "no evidence was introduced to show how Production's experience in bank asset buying equipped it to represent airplane manufacturers in procuring contracts" (Resp. Brief 5) is inaccurate in that it disregards another portion of the evidence in which it was testified that R. N. Webster, President of Production, represented an established aviation company and was a controlling factor of that company (R. 216, 217, testimony of Kennedy).

The fact statement that "Globe recognizes that its payments to Production on its Government business were 'payments . . . not in the ordinary course of (Globe's) business' " (Resp. Brief 5, 15) is inaccurate and misleading, as a reference to the Prospectus (at R. 389) will show.

II.

Need for the Decision of this Court on Questions Presented

In the Brief in Opposition, the Government argues against the allowance of the writ of certiorari on several grounds.

A.

Contingent Fee Claim

First, the Government contends, generally, that its claims in the case at bar arose out of a "peculiar set of facts" and that the issue is "of no general importance in the bankruptcy field" (Resp. Brief 10). With respect to the contingent fee claim, this contention is refuted by the Government's own experience and its evidence in the case at bar. The need for setting up criteria for the application of the exceptive clause of the Covenant against Contingent Fees was clearly recognized in the Case Report of April 17, 1945, from the Air Technical Service Command to the Commanding General of the Army Air Force. Quoting from this Report (R. 33-42, at 42):

"11. The specific problems presented are particularly important due to the fact that the Covenant against Contingent Fees is a standard clause contained in contracts entered into by the Government for procurement, *and a solution may affect many branches of the service.* The conclusions of this Headquarters set out above are transmitted herewith, but it is requested and recommended that an authoritative determination be made by your Headquarters as to the standards and tests it is desired, *as a matter of policy,* should be applied in order that a uniform interpretation may be made . . .". (italics ours)

Also see Case Report of August 2, 1945 of the Chief of the Procurement Division of the Air Technical Service Command (R. 26) and comments of September 4, 1945 by the Acting Judge Advocate of the Air Service Technical Command (R. 22).

However, without setting up the criteria, and although conceding that Production was a bona fide established commercial or selling agency (R. 38), the Government decided that "on the facts" Globe violated the covenant and, therefore, the Government now argues that the case at bar stands alone on its "peculiar set of facts".

In this connection, it should be noted that in April, 1943, Jacob I. Davis, Special Assistant to the Under Secretary of the Navy, testified before the House Committee on Naval Affairs, at Hearings on H. R. 1900, 78th Congress, 1st Session, (the bill referred to by the Government in its Brief at page 13):

> "We have given it (the exceptive clause of the Covenant against Contingent Fees) an interpretation for administrative purposes as strict as we think the language can bear, and so strict that we are not willing to have the Government stand on it in the Court of Claims after the duration has passed".

May we be permitted to assume that this Court will take judicial notice of the fact that procurement contracts, similar to the contracts in the case at bar, were legion, and that in each such contract, there was involved the basic question as to whether a commercial or selling agency employed by a contractor on a congent fee basis to procure the contract, met the test of the exceptive clause.

It is significant that the Government does not, because apparently it cannot, point to a similar determination under other like procurement contracts, more particularly, since the Record shows that Production had been employed by other contractors to procure, and had procured, like Government contracts for them (R. 86-87).

Thus, whether a commercial or selling agency, employed by a contractor on a contingent fee basis to procure a Government contract, meets the test of the exceptive clause, is not peculiar to the case at bar. It is a question of general importance involved in all procurement contracts with the Government secured by a commercial selling agency upon a contingent fee basis. The determination depends upon the interpretation of

the scope and meaning of the exceptive clause, particularly, of the elements of "bona fide established" and "maintained", where the commercial or selling agency employed had not previously been regularly employed by the contractor in selling its products generally and was not "maintained" by the contractor. In these aspects, the case at bar is not sui generis. Therefore, we respectfully submit, there is need for setting up uniform criteria and, for that purpose, the authoritative interpretation by this Court of the scope and meaning of the exceptive clause is of vital importance.

Nor is the Government's poslition supported, as it contends, by the legislative history of the exceptive clause (Resp. Brief 11-13). Without attempting to deal with every facet of the Government's argument, it may suffice to indicate that the experience of World War I made it necessary to relax the ban on the employment of commercial or selling agencies in the procurement of Government contracts. The exceptive clause, first used in 1924, was incorporated in Executive Order No. 9001 with the view of all-out production in the shortest possible time. Looking to that purpose, and without relaxing the ban as to those who traded upon "purported influence or other improper methods" (Resp. Brief 12), the provision should be construed liberally within the purview of this objective. It may be observed that if the Government's position should prevail, it would, in effect, set up a monopoly of privilege in favor of such agencies as existed when the Executive Order was promulgated, and, even as to them, would permit their employment by those con-

tractors only whom they had represented commercially before World War II.

It is respectfully submitted that the proper test, and the one which would effectively carry out the objective of the Executive Order, should be, as found by the Referee (R. 471), and affirmed by the District Court (R. 507), that of bona fides.

With regard to the provision in the covenant, which, upon its breach, gives the Government "the right to annul the contract, or in its discretion, to deduct . . . the amount of such . . . contingent fees", the Government argues:

(1) That, under the quoted language, the Government may either annul the contract or deduct from its price the amount of the contingent fees and, where the contract is not annulled, the deduction must be made as of course (Resp. Brief 17-18);

(2) That, in the case at bar, payments were made in full by the Government to Globe without any deductions for the amount of the contingent fees because, so the Government surmises, either the disbursing officers did not know that the subject of the violation of the covenant was then under investigation by the procurement officers, or, if they did know, it was "an inadvertent error" (Resp. Brief 16-17); and

(3) That, assuming it was intended to waive the right to deduct, the Government officials acted under a mistake of law, which, under the cases cited, would

not be binding upon the Government (Resp. Brief 17-18).

Replying seriatim:

(1) The phrase, ", or, in its discretion,", as it is structurally set up and punctuated, relates to what follows, namely, "to deduct". Unless so construed, the phrase adds nothing and becomes mere surplusage. The right to annul, and its implied correlative, the right not to annul, is paralleled, by employing the quoted phrase, by the right to deduct and, by a like implication, the correlative right not to deduct; and in each such situation the right was intended to be exercised in the discretion of the authorized Government officers, whenever in their judgment, the prosecution of the War would thereby be facilitated. It is respectfully submitted that such was the actual intent of Executive Order No. 9001. In carrying forward the objective of its preamble for "an all-out industrial mobilization of the United States in order that the materials necessary to win the war may be produced in the shortest possible time", the President delegated to the Secretary of War and to the officers or civilian officials designated by the Secretary (Pet. App. 40), the authority to enter into contracts, and amend or modify them, "and to make advance, progress, and other payments without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts" (Pet. App. 39-40) and, further, to "enter into agreements with contractors and/or obligators, modifying or releasing accrued obligations of any sort, including accrued liquidated dam-

ages or liability under surety or other bonds, whenever, in the judgment of the War Department . . . the prosecution of the war is thereby facilitated." (Pet. App. 41). And the Warranty against Contingent Fees, which is Title II of the Executive Order (Pet. App. 41-42), should be construed so as to carry out the overall policy of the Executive Order. Therefore, the scope and meaning of the provision first above quoted presents a question of vital general importance and, it is respectfully submitted, should be authoritatively interpreted and settled by this Court.

(2) The Record does not support either the inference or the surmise of the Government. On the contrary, if any inference is to be drawn from the Record, it must be that, unless the vouchers of the procurement officers had authorized payments in full, the disbursing officers would not have made them (see R. 353-373, listed payments by Government to Globe; and R. 225-230, testimony of Ratliff). The Government knew from the very outset that Globe employed Production on a contingent fee basis to procure contracts from any source, including the Government (R. 169-190, testimony of Kennedy, and exhibits in the order identified, R. 88-91, 91-93, 94-95, 55-56, 58-59, 57-58). Throughout, as the Record amply discloses, there was available and furnished to the Government complete information with regard to payments by Globe to Production (R. 53-54; R. 101, list of payments; and R. 225-230, testimony of Ratliff), and the employment of Production by other contractors (R. 86 and 74; and R. 38, earnings of Production from 1940 through 1943).

(3) If the clause is construed as vesting in the authorized Government officers of the War Department a discretion not to deduct, as we contend, then, obviously, the payments without deduction made by the Government to Globe were not made under a mistake of law, as the Government argues, and the cases cited by it are not pertinent.

It is, therefore, respectfully submitted that in this aspect, it is important, not only as applicable to the case at bar, but generally, that it be settled by this Court whether there was conferred upon the War Department and its officers the correlative discretion not to deduct whenever in their judgment the prosecution of the war would thereby be facilitated.

With regard to whether the deduction of the amount of contingent fees constitutes a provision for liquidated damages or a penalty, the Government, in a note (Resp. Brief 19), suggests that it is a provision for liquidated damages and, therefor, allowable in bankruptcy.

In our Petition (19) and supporting Brief (Pet. 54), this point has already been considered and discussed and, at this time, there may be no need to expand upon the argument.

B.

Renegotiation Claim

The Government argues that the War Price Contracts Adjustment Board and, on appeal, the Tax Court, had the exclusive jurisdiction to determine the renegotiation claim, and cites a number of cases in support of its position (Resp. Brief 19-21). It is needless to repeat here what we have already said at length on this question in our Petition (14,25-30) and supporting Brief (Pet. 56-62). Nor, at this stage, would it be proper to argue the ultimate question as to whether the War Price Contracts Adjustment Board had the exclusive jurisdiction. Therefore, comments on the cases cited by the Government in support of its position, would unduly extend this Brief. We respectfully submit that there still remains to be settled by this Court the question, argued in our Petition and supporting Brief, whether the War Price Contracts Adjustment Board, in circumstances as presented by the case at bar, had the exclusive jurisdiction and precluded the Bankruptcy Court from determining an unliquidated renegotiation claim. For the purposes of our Petition for a Writ of Certiorari, it may suffice to indicate that in none of the cases cited was the precise question here presented settled by this Court.

With the indulgence of this Court, we direct its attention to the fact that the Government has bypassed, in its Brief in Opposition, the other important questions presented by us with regard to the operative

application of section 57d and the scope of section 63a(5) of the Bankruptcy Act (Pet. 14-15, 30-34, and supporting Brief, Pet. 62-66).

Conclusion

It is respectfully submitted that the writ of certiorari should be granted.

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